

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALLEN DAVID FONG,

Petitioner,

v.

ARNOLD,

Respondent.

No. C 15-01568 BLF (PR)

ORDER TO SHOW CAUSE

Petitioner, a state prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state conviction. Petitioner has paid the filing fee. (Docket No. 4.)

BACKGROUND

According to the petition, Petitioner was found guilty of assault with a deadly weapon with a special allegation of great bodily injury and of participation in street gang activity, in violation of section 245 and 186.22 of the California Penal Code. (Pet. at 2.) Petitioner was also found guilty of witness dissuasion. (*Id.*) Petitioner was sentenced to 17 years in state prison on August 4, 2011. (*Id.*)

Petitioner appealed his conviction, and the state appellate court affirmed in 2011. (Pet. at 3.) The state high court denied review in 2013. (*Id.*) In 2014, the

1 state high court denied Petitioner's petition for a writ of mandate. (*Id.*) Petitioner
2 also sought habeas relief in the state courts. (*Id.*)

3 Petitioner filed the instant federal habeas petition on April 4, 2015.

4 DISCUSSION

5 A. Standard of Review

6 This court may entertain a petition for a writ of habeas corpus "in behalf of a
7 person in custody pursuant to the judgment of a State court only on the ground that
8 he is in custody in violation of the Constitution or laws or treaties of the United
9 States." 28 U.S.C. § 2254(a).

10 It shall "award the writ or issue an order directing the respondent to show
11 cause why the writ should not be granted, unless it appears from the application that
12 the applicant or person detained is not entitled thereto." *Id.* § 2243.

13 B. Legal Claims

14 Petitioner claims the following grounds for federal habeas relief: (1) the
15 appellate court's denial of his petition of re-hearing was erroneous and violated
16 section 68081 of the California Government Code, his state and federal due process
17 rights, and the Fourteenth Amendment; and (2) ineffective assistance of appellate
18 counsel for failing to argue in the petition for review to the California Supreme
19 Court that the state appellate court's denial of re-hearing was a violation of the
20 federal Constitution.

21 To the extent that Petitioner alleges that state law has been violated, federal
22 habeas relief is unavailable for such violations. *See Estelle v. McGuire*, 502 U.S. 62,
23 67 (1991) ("We have stated many times that 'federal habeas corpus relief does not
24 lie for errors of state law.'"). However, if the state court's incorrect application of
25 state law was arbitrary, discriminatory or fundamentally unfair such that Petitioner
26 was denied due process under the Fourteenth Amendment, habeas relief is available.
27 *See, e.g., Kennick v. Sup. Ct. of State of Cal., Los Angeles Cty.*, 736 F.2d 1277, 1280
28 (9th Cir. 1984).

Accordingly, the Court finds that, liberally construed, Petitioner has stated the two following cognizable claims for relief: (1) the state appellate court's denial of his petition for re-hearing violated his due process rights under the Fourteenth Amendment of the federal Constitution; and (2) ineffective assistance of appellate counsel.

For the foregoing reasons and for good cause shown,

2. Respondent shall file with the court and serve on Petitioner, within **sixty (60) days** of the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent shall file with the answer and serve on Petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition. At that time, Respondent shall also return the magistrate judge jurisdiction consent form.

If Petitioner wishes to respond to the answer, he shall do so by filing a traverse with the Court and serving it on Respondent within **thirty (30) days** of his receipt of the answer.

1 3. Respondent may file a motion to dismiss on procedural grounds in lieu
2 of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules
3 Governing Section 2254 Cases. If Respondent files such a motion, Petitioner shall
4 file with the Court and serve on Respondent an opposition or statement of non-
5 opposition within **twenty-eight (28) days** of receipt of the motion, and Respondent
6 shall file with the court and serve on Petitioner a reply within **fourteen (14) days** of
7 receipt of any opposition.

8 4. It is Petitioner's responsibility to prosecute this case. Petitioner is
9 reminded that all communications with the Court must be served on Respondent by
10 mailing a true copy of the document to Respondent's counsel. Petitioner must keep
11 the Court and all parties informed of any change of address by filing a separate
12 paper captioned "Notice of Change of Address."

13 **IT IS SO ORDERED.**

14 DATED: May 7, 2015


15 BETH LABSON FREEMAN
16 United States District Judge